

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STEVE HALLMON, )  
)  
Plaintiff, )  
) C.A. No. 02C-05-317 MJB  
v. )  
)  
C. RAYMOND DAVIS & SONS, )  
INC. )  
)  
Defendant. )

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MARY ELLEN PAYLOR, )  
Individually and As Personal )  
Representative of Daniel Paylor )

Plaintiff, )

v. )

SUMMIT EQUIPMENT RENTALS, )  
INC., SHELLY'S BUILDING )  
SUPPLY, and C. RAYMOND )  
DAVIS & SONS, INC., )

Defendants. )

And )

SUMMIT EQUIPMENT RENTALS, )  
INC., )

Third Party Plaintiff, )

v. )

BRESCIA CONSTRUCTION, INC., )

Third Party Defendant. )

Submitted: March 17, 2006

Decided: March 30, 2006

On Motion for Summary Judgment by  
Defendant Shelly's Building Supply, Inc., **DENIED.**

**OPINION AND ORDER**

Mark L. Reardon, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware,  
Attorney for Defendant Shelly's Building Supply, Inc.

Brian E. Lutness, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware, Attorney for Third  
Party Defendant Brescia Construction, Inc.

BRADY, J.

## **Procedural History**

This is a Motion for Summary Judgment, or in the alternative, a Motion *In Limine* to exclude expert testimony filed by Defendant Shelly's Building Supply, Inc. ("Shelly's) against Third Party Defendant Brescia Construction, Inc. ("Brescia"). Two actions arising from the incident in this case were filed. Both were consolidated into the current action before the Court.

## **Facts**

The instant dispute arises from a construction incident occurring at what is now known as the Brandywine Baptist Church on Mount Lebanon Road in Wilmington, Delaware on August 29, 2000. At the time of the incident, Brescia Construction, Inc. was working as a subcontractor to the general contractor C. Raymond Davis & Sons ("C. Raymond"). Brescia rented a crane and an operator (Robert Wyatt) from Summit to lift roof trusses to their proper position before being secured by Brescia employees to the truss bracing.

Following the bracing of nearly all the roof trusses, Brescia determined that one of the roof trusses was in the wrong position and had to be moved. The crane was hooked to one of the trusses and the bracing on the truss was removed. At this point many of the trusses collapsed, injuring

Daniel Paylor and Steve Hallmon. Daniel Paylor sustained severe injuries as a result. Mr. Paylor died days later in the hospital. Steve Hallmon was also injured in the incident and the cases have been consolidated for that reason.

Defendant Shelly's has filed the instant Motion for Summary Judgment/Motion *In Limine* against Third Party Defendant Brescia alleging insufficient facts in the record to proceed against Shelly's and insufficiencies of Brescia's expert opinion.

### **Standard of Review**

The standard for granting summary judgment is high.<sup>1</sup> Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.<sup>2</sup> "In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party."<sup>3</sup> When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.<sup>4</sup>

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<sup>1</sup> *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

<sup>2</sup> Super.Ct.Civ.R. 56(c).

<sup>3</sup> *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).

<sup>4</sup> *Guttridge v. Iffland*, 889 A.2d 283 (Del. 2005).

## **Applicable Law**

### **Motion *In Limine***

Shelly's argues that if the Motion for Summary Judgment is denied, the expert report should be excluded under a motion *in limine* mechanism. Shelly's argues the expert report lacks the proper methodology, has no factual basis, and establishes no proximate cause that could be attributed to Shelly's.

Brescia argues the Motion *In Limine* is without merit and premature. In addition, Shelly's has not served expert interrogatories for Mr. Haglid or issued a notice for his deposition.

The Court agrees with Brescia that the Motion *In Limine* is premature. The Haglid report was produced on November 4, 2005, before the deadline set in the applicable case scheduling order.<sup>5</sup> The scheduling order for this litigation sets the deadline for expert depositions at May 19, 2006.<sup>6</sup> Time remains to explore the opinions of Mr. Haglid and if his testimony is not sufficient at that time, a Motion *In Limine* may be appropriate. Granting a Motion *In Limine* based only on Mr. Haglid's preliminary report when the time to take his deposition has not expired is premature.

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<sup>5</sup> There was some confusion at the hearing on these motions regarding which case scheduling order currently applied to this case. It was agreed by all parties present that the October 27, 2005 order issued by Judge Slights is the effective order.

<sup>6</sup> At oral argument Counsel for Shelly's agreed the May 19, 2006 date in the current case scheduling order governs the deadline for expert depositions.

## Motion for Summary Judgment

Shelly's first argues that it is entitled to summary judgment because Brescia's claim against it is premised on an expert's theory that has no factual basis in the record. Brescia supplied Shelly's with an expert report of a professional engineer; Mr. Klaus Haglid. The report cites knots and moisture level of the trusses Shelly's supplied as contributing factors in the collapse. Shelly's argues the expert report is not based on any reliable methodology, or compared to industry standards and amounts to a conclusory and speculative report that may not be admitted into evidence to preclude summary judgment.

Brescia counters by stating there is a material issue of fact for jury determination because the expert report of Klaus Haglid is based on observations made when he went to the site the day after the incident, at which time he observed the trusses and took several pictures to support his findings. Brescia argues these observations make the Haglid report neither speculative nor conclusory.

The issues here are analogous to the recent Superior Court decision in *Kennedy v. Invacare Corp.*<sup>7</sup> In *Kennedy*, the defendant made a motion for summary judgment based on the speculative nature of the plaintiff expert's

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<sup>7</sup> 2005 WL 2249564 (Del. Super. Ct.)

preliminary report. The liability issue in the case dealt with an injury that was sustained due to an alleged defect in a motor operated bed.<sup>8</sup> The plaintiff expert reviewed a medical report, rental documentation and photographs of the bed after the malfunction.<sup>9</sup> The expert report established that absent negligence of the defendants, the injury would not have taken place and the conclusions were “within a reasonable degree of engineering probability.” Based on this factual review, the Court found the report was not based on “subjective belief or speculation.”<sup>10</sup>

The expert report issued by Mr. Haglid for Brescia states that he reviewed manufacturer’s specifications for the trusses, manufacturer’s drawings, photographs, wood guide for characteristics with moisture, ASTM Standard, D9-87, “Standard Terminology Relating to wood,” effect of temperature on Mode 1 fracture toughness of graphite/epoxy composites, diagrams and field notes. In addition, Mr. Haglid went to the site the day after the incident to observe the trusses in person. Based on these facts, Mr. Haglid came to the conclusion that, “to a reasonable degree of engineering probability,”<sup>11</sup> the material condition of the truss member in question caused the incident, the material condition or defect of the wood truss member was

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*3.

<sup>10</sup> *Id.*, citing *Price v. Blood Bank of Del.*, 790 A.2d 1203, 1210 (Del. 2002).

<sup>11</sup> *Defendant Shelly’s Building Supply Motion for Summary Judgment/Motion In Limine Against Brescia Construction*, exhibit B (*Klaus Haglid Expert Report*) at 3.

visually apparent, and the defect could have been found and the incident avoided.<sup>12</sup>

Brescia further claims that a conclusion by Plaintiff Paylor's expert that Shelly's failure to put warning labels was a contributing causal factor in the incident also creates an issue of fact for jury determination. The expert report of Plaintiff Paylor makes reference to a possible issue of negligence on Shelly's behalf. The report of Steven A. Estrin states in section 7.10 that a contributing factor in the incident was "Shelly's failure to staple the TPI Instruction for Continuous Lateral Bracing being required to the top cord of each truss contributed to the truss collapse and Mr. Paylor's fall to fatal injury."<sup>13</sup>

At oral argument, counsel for Shelly's focused on the reference in the Haglid expert report to an unidentified witness as an impermissible basis for the conclusions in the report. This argument would have force if Mr. Haglid

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<sup>12</sup> The full findings of the expert report of Klaus Haglid read:

1. To a reasonable degree of engineering probability, the wood trusses were very wet and the moisture made the trusses weaker and more flexible.
2. To a reasonable degree of engineering probability, the material defect of the three knots concentrated at one point made the scissor truss very weak.
3. To a reasonable degree of engineering probability, the material condition of the truss member in question caused this accident.
4. To a reasonable degree of engineering probability, the material condition or defect of the wood truss member was visually apparent.
5. To a reasonable degree of engineering certainty, with a reasonably careful visual inspection of the wooden truss member, this defect could have been found and the accident avoided.

<sup>13</sup> *Third-Party Defendant Brescia Construction Opposition to Motion for Summary Judgment/Motion In Limine*, exhibit C (*Expert Report of Steven A. Estrin*) at 4.

did not observe the site himself and based his report solely on the representations of the unnamed witness, but that is not the case. Even without the reference to the unnamed witness representations, the expert report withstands scrutiny because it is based on the personal observations of Mr. Haglid.

The expert reports issued by Mr. Haglid and Mr. Estrin, timely presented to opposing parties, create issues of fact for the jury regarding Shelly's liability. The Haglid report is based on personal observations and opined within a reasonable degree of engineering probability. Mr. Eskin's conclusions similarly create issues of material fact that remain to be decided. Taking the facts in the light most favorable to the nonmoving party, these issues of material fact are appropriate for jury determination, thereby precluding summary judgment.

### **Conclusion**

For the reasons set forth herein the Motion *In Limine* is **DENIED** and the Motion for Summary Judgment of Defendant Shelly's Building Supply, Inc. is hereby **DENIED**. Both Motions are **DENIED** without prejudice.

**IT IS SO ORDERED.**

\_\_\_\_\_/s/  
M. Jane Brady  
Superior Court Judge



